Supreme Court, U.S.
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No. 02-1576

In the Supreme Court of the United States

VERA NIGRO, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY IN OPPOSITION

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QUESTION PRESENTED

Whether a federal court of appeals has jurisdiction under 5 U.S.C. 7123(a) to review a determination by the Federal Labor Relations Authority not to issue an unfair labor practice complaint.

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OPINION BELOW

The order of the court of appeals (Pet. App. 8) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 25, 2002. A petition for rehearing was denied on January 28, 2003. The petition for a writ of certiorari was filed on April 28, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title VII of the Civil Service Reform Act of 1978 (the Act), Pub. L. No. 95-454, 92 Stat. 1191 (5 U.S.C.

7101 *et seq.*), governs labor relations between federal agencies and their employees. The Act established the Federal Labor Relations Authority (FLRA or Authority), a three-member bipartisan body within the Executive Branch, and gave it a role analogous to that which the National Labor Relations Board (NLRB) plays in the private sector. 5 U.S.C. 7104. The Act requires the FLRA to supervise the collective bargaining of federal employees and to administer other aspects of federal labor relations, including the adjudication of unfair labor practice complaints, negotiability disputes, bargaining unit issues, arbitration exceptions, and representational election matters. 5 U.S.C. 7105(a)(1) and (2); see *Bureau of Alcohol, Tobacco & Firearms* v. *Federal Labor Relations Auth.*, 464 U.S. 89, 92-93 (1983). The FLRA thus ensures compliance with the statutory rights and obligations of federal employees, labor organizations that represent such federal employees, and federal agencies.

The General Counsel of the FLRA acts as the body's enforcement arm. The FLRA has no power to issue unfair labor practice complaints; that power is vested exclusively with the FLRA's General Counsel. 5 U.S.C. 7118(a)(1). The Act provides that the General Counsel shall investigate any allegation that a labor organization or federal agency engaged in an unfair labor practice and "may issue and cause to be served upon the agency or labor organization a complaint." 5 U.S.C. 7118(a)(1). In any case where the General Counsel does not issue an unfair labor practice complaint, the General Counsel must provide the complainant a written statement of the reasons for not issuing a complaint. 5 U.S.C. 7118(a)(1). The Act does not otherwise limit the discretion of the General Counsel in his decision whether or not to issue an unfair labor practice

complaint. Moreover, the FLRA has no authority to review the General Counsel's determination. See *Rizzitelli* v. *Federal Labor Relations Auth.*, 212 F.3d 710, 712 (2d Cir. 2000) (citing *Turgeon* v. *Federal Labor Relations Auth.*, 677 F.2d 937, 938 (D.C. Cir. 1982) (per curiam)).

2. This case concerns several decisions by the General Counsel of the FLRA not to issue unfair labor practice complaints.

a. Petitioner Vera Nigro was an employee of the Internal Revenue Service (IRS) and a local officer of the National Treasury Employees Union (NTEU), Chapter 65. 8/2/01 FLRA Ltr. 1. In February 2000, petitioner was removed from her position with the IRS. *Ibid.* After her removal from federal service, petitioner continued to serve as a union official until September 2000, when she was defeated in a local union election. *Ibid.* Petitioner filed several grievances concerning her termination and other matters pursuant to the procedures prescribed in the NTEU collective bargaining agreement. 8/28/01 FLRA Ltr. 1. Although NTEU initially invoked arbitration over petitioner's grievances, it ultimately determined not to pursue the cases to arbitration. 8/2/01 FLRA Ltr. 1-2.

Petitioner then filed four unfair labor practice charges with the Washington Regional Office of the FLRA relating to these events. 7/16/01, 8/1/01, 8/2/01, 8/28/01 FLRA Ltrs. Three of the charges were filed against the NTEU and concerned both NTEU's decision not to pursue petitioner's grievances to arbitration (see 8/2/01, 8/28/01 FLRA Ltrs.) and the conduct of the NTEU local chapter election which resulted in her ouster as a NTEU official (see 8/1/01 FLRA Ltr.). The fourth charge, filed against the IRS, alleged that

various agency actions interfered with her rights under the Act. 7/16/01 FLRA Ltr.

The FLRA's Washington Regional Office investigated each of the charges and determined that they were all without merit. Accordingly, the Washington Regional Director declined to issue unfair labor practice complaints and notified petitioner of those decisions. 7/16/01 FLRA Ltr. 3; 8/1/01 FLRA Ltr. 3; 8/2/01 FLRA Ltr. 3; 8/28/01 FLRA Ltr. 1. Pursuant to her rights under FLRA regulations, petitioner appealed the Regional Director's determinations to the General Counsel. In each case, the General Counsel denied the appeal. 7/9/02 Gen. Counsel Ltr. 1 (WA-CA-00652); 7/9/02 Gen. Counsel Ltr. 1-2 (WA-CO-01-0035); 7/10/02 Gen. Counsel Ltr. 1; 7/11/02 Gen. Counsel Ltr. 1.

b. Invoking 5 U.S.C. 7123(a), petitioner sought review of the General Counsel's determinations in the United States Court of Appeals for the Fourth Circuit. The FLRA moved to dismiss the petitions for review for lack of subject matter jurisdiction. The court of appeals, without comment, granted the motion and dismissed the petitions for review. Petitioner's request for rehearing and rehearing en banc was also denied without comment.

ARGUMENT

The court of appeals correctly determined that it was without jurisdiction to review decisions of the FLRA's General Counsel not to issue unfair labor practice complaints. This holding does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

1. Section 7123 provides that "[a]ny person aggrieved by any final order of the [FLRA] * * * may * * * institute an action for judicial review of the

[FLRA's] order in the United States court of appeals." 5 U.S.C. 7123(a). Section 7123 is the only provision in the Act that provides for judicial review of FLRA orders.

a. In the instant case, the court of appeals dismissed petitioner's petition for review for lack of jurisdiction. Pet. App. 8. That decision was consistent with the decisions of every court of appeals to have addressed the question whether a court of appeals has subject matter jurisdiction to review decisions by the FLRA's General Counsel not to issue unfair labor practice complaints. Each of those courts concluded that it was without subject matter jurisdiction because such decisions are decisions of the General Counsel only and do not constitute a "final order" of the FLRA. See *Rizzitelli* v. *Federal Labor Relations Auth.*, 212 F.3d 710, 712-713 (2d Cir. 2000); *Patent Office Prof'l Ass'n* v. *Federal Labor Relations Auth.*, 128 F.3d 751, 752-753 (D.C. Cir 1997), cert. denied, 523 U.S. 1006 (1998); *AFGE, Local 1749* v. *Federal Labor Relations Auth.*, 842 F.2d 102, 105 (5th Cir. 1988) (per curiam); *Martinez* v. *Smith*, 768 F.2d 479, 480 (1st Cir. 1985); *Turgeon* v. *Federal Labor Relations Auth.*, 677 F.2d 937, 940 (D.C. Cir. 1982); *Columbia Power Trades Council* v. *United States Dep't of Energy*, 671 F.2d 325, 329 (9th Cir. 1982).

The most fulsome discussion of the issue is found in the D.C. Circuit's decision in *Turgeon*. There, the D.C. Circuit held:

> The Act provides that an aggrieved person may obtain judicial review in the appropriate court of appeals * * * of "any final order of the Authority." * * * This is the only judicial review provision in the Act. The Act affords the Authority no opportunity to review a decision of the General Coun-

> sel declining to issue an unfair labor practice complaint—it is only upon the issuance of a complaint that the Authority is empowered to exercise its decision-making functions * * * Since the General Counsel has not issued a complaint, and the Authority has not acted at all in this case, it is clear that there is no "final order of the Authority" and hence no decision that we can review pursuant to section 7123.

677 F.2d at 938-939. Petitioner offers no authority for the proposition that the General Counsel's exercise of his discretion not to issue an unfair labor practice complaint may be construed as a "final order of the Authority," and does not otherwise offer any reason to abandon the courts of appeals' settled interpretation of the Act's judicial review provision.

b. Although not cited by petitioner, the Ninth Circuit, relying on a footnote in this Court's decision in *Heckler* v. *Chaney*, 470 U.S. 821, 833 n.4 (1985), stated once that the General Counsel's determination not to issue a complaint is only "presumptively" unreviewable. *Montana Air Chapter No. 29* v. *Federal Labor Relations Auth.*, 898 F.2d 753, 756 (9th Cir. 1990). The Ninth Circuit adopted the view that a decision not to exercise enforcement authority is reviewable when the decision is based either on the agency's conclusion that it lacked jurisdiction or on a general policy "so extreme as to amount to an abdication of its statutory responsibilities." *Ibid.* (quoting *Heckler*, 470 U.S. at 833 n.4).

Other courts, however, have questioned the reasoning of *Montana Air* and its determination that the General Counsel's decision not to exercise enforcement authority is only presumptively—as opposed to absolutely—unreviewable. See *Patent Office Prof'l*

Ass'n, 128 F.3d at 753. ("Lest there be any lingering confusion * * * a decision of the General Counsel of FLRA not to file a complaint is not judicially reviewable given that the statute provides for review only of decisions of the Authority. In *Heckler*, the Supreme Court dealt with jurisdiction under the Administrative Procedure Act * * *. Nothing in *Heckler*—and especially not the Association's favored footnote—affects the reviewability of decisions of the General Counsel under the [Act].") Moreover, *Montana Air* did not purport to distinguish the Ninth Circuit's earlier conclusion in *Columbia Power Trades Council* that "[t]here is no provision in § 7118 for review in the courts of [the General Counsel's enforcement] determination." 671 F.2d at 329. To the extent that the Ninth Circuit's decision in *Montana Air* created an intra-circuit conflict, it is not a basis for an exercise of this Court's certiorari jurisdiction. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam).

In any event, even *Montana Air* fails to provide a basis for jurisdiction in this case. Nothing in the record suggests that the General Counsel either believed he lacked jurisdiction to issue unfair labor practice complaints in response to petitioner's allegations, or that the General Counsel otherwise had adopted a general policy of non-enforcement that amounted to an abdication of his statutory responsibilities. Here, the General Counsel investigated petitioner's many allegations and decided not to file an unfair labor practice complaint only after determining that each of the allegations lacked merit. Even if that were not the case, the unpublished decision in this case could not contribute to any split in the published authorities.

2. The conclusion that decisions by the FLRA General Counsel to file (or not file) unfair labor practice complaints are unreviewable is further supported by the history of the Act—specifically Congress's manifest intent to create, in the FLRA, a public sector analogue to the NLRB. It was the plain intent of Congress to allocate authority among the FLRA and its General Counsel in the same manner as the NLRB and its General Counsel. See S. Rep. No. 969, 95th Cong., 2d Sess. 102 (1978) ("The General Counsel is intended to be autonomous in investigating unfair labor practice complaints * * *. Specifically, the Authority would neither direct the General Counsel concerning which unfair labor practice cases to prosecute nor review the General Counsel's determinations not to prosecute, just as the National Labor Relations Board does not exercise such control over its General Counsel."); H.R. Rep. No. 1403, 95th Cong., 2d Sess. 41-42 (1978) ("The committee intends that the * * * General Counsel be analogous in role and function to the General Counsel of the [NLRB]."); see also *Bureau of Alcohol, Tobacco & Firearms*, 464 U.S. at 92-93. When Congress was considering the Act it did so against the background of this Court's decision that "the [NLRB's] General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint." *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967); see *NLRB* v. *United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 128-131 (1987). Thus, applying the analogy to the NLRB, the D.C. Circuit could similarly conclude of the FLRA, that "Congress intended a decision of the General Counsel declining to issue an unfair labor practice complaint to be unreviewable." *Turgeon*, 677 F.2d at 939. Indeed, each of the other courts of appeals that have addressed the reviewability of the FLRA General Counsel's pro-

secutorial functions has also relied on precedent developed under the NLRB's practices. See *Rizzitelli*, 212 F.3d at 712 n.1; *AFGE, Local 1749*, 842 F.2d at 104-105; *Martinez*, 768 F.2d at 480; *Columbia Power Trades Council*, 671 F.2d at 329.

3. Although petitioner contends that the order of the court of appeals presents constitutional questions, petitioner never articulates how the General Counsel acted in derogation of her constitutional rights.

What petitioner does present is largely a request for error correction. Petitioner's contentions amount to nothing more than disagreements with the legal reasoning and factual findings of the General Counsel. However, where judicial review of agency action is precluded, allegations of legal or factual error are insufficient to confer jurisdiction. See *Boire* v. *Greyhound*, 376 U.S. 473, 481 (1964) (exception to preclusion of judicial review should "not * * * be extended to permit plenary district court review of [NLRB] orders * * * whenever it can be said that an erroneous assessment of the particular facts * * * has led it to a conclusion which does not comport with the law"); see also *Griffith* v. *Federal Labor Relations Auth.*, 842 F.2d 487, 497 (D.C. Cir. 1988) ("garden variety" errors of law or fact will not provide grounds to review agency action otherwise not subject to judicial review).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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